BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MIKE A. BRANIFF Claimant	)	
VS.	)	
CEDAR BUILT USA INC. Respondent	)	Docket No. 262,376
AND	)	
HAWKEYE SECURITY INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the July 21, 2003 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on January 13, 2004.

APPEARANCES

Randy S. Stalcup of Wichita, Kansas, appeared for the claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined there was just cause for claimant providing notice within 75 days of his date of accident. The ALJ further determined the claimant suffered an accidental injury arising out of and in the course of employment and awarded him a 24.9 percent work disability based on a 26.2 percent task loss and a 23.6 percent wage loss.

The respondent requests review of the following issues: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) whether timely notice

was given; (3) whether the claimant is entitled to temporary total disability compensation; and, (4) nature and extent of claimant's disability. Respondent argues the claimant's accident did not arise out of and in the course of employment and that claimant did not give timely notice. In the alternative, if it is determined claimant suffered accidental injury arising out of and in the course of his employment and that timely notice was given, respondent argues the claimant should be limited to his 10 percent functional impairment.

Claimant argues he is entitled to a 38 percent work disability based on a 53.4 percent task loss (Dr. Zimmerman's opinion) and a 23.6 percent wage loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent to assemble storage sheds. Claimant had worked for respondent for approximately two and a half years. Respondent's customers would purchase a particular size and style storage shed and claimant would assemble or build the storage shed at the customer's site. On November 8, 2000, claimant and a co-worker drove to Manhattan, Kansas, to erect two storage sheds.

While at the first work site on November 8, 2000, the claimant did a lot of heavy lifting but could not recall a specific traumatic injury. However, the next morning he noted he could hardly walk and was experiencing back pain as well as pain radiating into his left leg.

On November 9, 2000, claimant and his co-worker returned to the work site to finish building the storage shed and then to the second work site to build the second storage shed. Claimant performed work but noted that his back was bothering him and he complained of his back pain to his co-worker. After the second shed was completed the claimant and his co-worker returned to respondent's business location in Wichita, Kansas. The claimant never performed any further work for respondent after November 9, 2000.

The following day the claimant called his supervisor, Earl Brand. Claimant testified that he told Mr. Brand that he had hurt his back while working in Manhattan and that he needed to seek medical treatment because his back was hurting too much to work. Mr. Brand agreed that claimant told him he was unable to work because of back problems but he testified that claimant said he did not suffer a work-related injury. But Mr. Brand noted that he offered to help claimant fill out an accident report. It was not explained why Mr. Brand would offer to help fill out an accident report if claimant had indicated he had not suffered a work-related accident. Mr. Brand further noted that when claimant later told him that claimant was seeking medical treatment Mr. Brand again told claimant to come in and fill out an accident report.

The claimant sought chiropractic treatment and then went to the Family Health Center on November 14, 2000. The history noted an onset of back pain the previous month which had worsened. The medical note further indicated claimant worked construction with heavy lifting and that he was not sure if his back pain was work-related.

During this time period the claimant called Greg Gillen, respondent's district manager, and asked what he needed to do in order to file a workers compensation claim. Mr. Gilllen responded that it might be too late but he faxed the form to respondent's office in Wichita and claimant picked it up. In the month before this conversation, the claimant said he had told Mr. Gillen that his back was sore but that he was not going to file a workers compensation claim. Mr. Gillen agreed that he might have had a couple of telephone conversations with claimant but he could not recall the specifics of those conversations.

Claimant saw Dr. D. Troy Trimble in December 2000 and was provided a light-duty status work note which the claimant gave to Mr. Brand on December 8, 2000. Mr. Brand told claimant that respondent could not accommodate the restrictions. Sometime in December 2000 claimant had a conversation with Mr. Brand and Jerry Gillen, respondent's owner, regarding when claimant was going to return to work. Claimant told them he would return as soon as he could. Claimant testified he received daily calls from Mr. Brand about his back condition and when he would be returning to work. Claimant also inquired if there was accommodated work available but nothing was ever offered.

After claimant's back surgery on March 20, 2001, claimant had a conversation with Mr. Brand about returning to work but Mr. Brand responded that he would have to talk to respondent's owners about the weight restrictions and that he would get back in touch with claimant. But he never did.

Claimant went to work for Air Techniques on April 27, 2001. Claimant had a 40-pound lifting restriction when he went to work for Air Techniques. Claimant sought that employment instead of returning to work for respondent because claimant felt respondent was not going to provide lighter work that would not aggravate his back. Claimant felt respondent was dragging its feet by failing to respond to his request for lighter work not building storage sheds.

Respondent argues that claimant did not suffer a work-related accident because he told Mr. Brand, a co-worker Mr. Vulgamore and Mr. Jerry Gillen that his back problems were not work-related. And the initial medical records did not specifically indicate claimant had suffered a traumatic work-related accident.

The claimant stated that he notified Mr. Brand that he had hurt his back building the storage shed in Wichita. He further stated that he thought his condition would improve and that is the reason he did not initially request medical treatment nor indicate to the health care providers that he had suffered a work-related accident. The claimant noted that

workers compensation claims were not well received by respondent. A co-worker corroborated claimant's impression in this regard and noted that the district manager Greg Gillen's two least favorite words were workers compensation. Claimant noted that he had experienced back pain for a month before this incident but had been able to work and initially thought his back pain would improve as it had in the past.

And in November, sometime before Thanksgiving, the claimant requested a form from the respondent's district manager, Greg Gillen, in order to file a workers compensation claim. That form was faxed to respondent's Wichita office where the claimant picked up the form. And claimant was provided an employer's report of accident by Mr. Brand which the claimant said he received on Tuesday, November 28, 2000.

It is undisputed that after claimant constructed the storage sheds in Wichita he could no longer work because of back pain. It is further undisputed that claimant told his supervisor his back pain prevented him from working. It is uncontradicted that in November, before the Thanksgiving day holiday, the claimant requested forms to file a workers compensation claim for his back. Lastly, claimant's supervisor gave the claimant an employer's report of accident to fill out on November 28, 2000.[1] The Board concludes the record as a whole supports claimant's contention that he notified respondent that he had suffered a work-related accident but simply delayed requesting medical treatment because he thought his condition would improve. When it did not, claimant then requested the paperwork to proceed with a workers compensation claim. Claimant has met his burden of proof to establish he suffered work-related injury to his back.

Respondent next argues the claimant failed to provide timely notice of his accident and the ALJ erred in determining there was just cause to extend the time period for providing notice. The Board affirms the finding that timely notice was provided but for a different reason than the ALJ.

As previously mentioned, the claimant's uncontradicted testimony was that he contacted Greg Gillen and requested forms to file a workers compensation claim. Claimant testified this conversation occurred before Thanksgiving. Claimant further testified that his supervisor, Mr. Brand, gave him an Employer's Report of Accident on Tuesday, November 28, 2000.

K.S.A. 44-520 (Furse 2000) states in part:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date

[1] Brand Depo., Ex. 3 indicates that the document was faxed on November 28, 2000.

> of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

The method of computing the 10 days requires that intermediate Saturdays, Sundays and legal holidays are to be excluded from the computation.[2]

As claimant described the onset of his back pain from his work activities on both November 8 and 9, 2000, the first day to start counting the 10-day period would be November 10, 2000, but because November 10, 2000, was Veterans Day, a legal holiday, it would be excluded from the computation. November 11 and November 12, 2000, fell on a Saturday and Sunday and likewise would be excluded. November 18 and November 19, 2000, would also be dates excluded because they fell on Saturday and Sunday. Likewise, November 23 and November 24, 2000, were the Thanksgiving Day legal holidays and would be excluded. Lastly November 25 and November 26, 2000, would be excluded because they fell on Saturday and Sunday. When all of the dates are excluded as provided by the amendment, the claimant had until November 28, 2000, to provide timely notice. As both the conversation with Mr. Greg Gillen and receipt of the form to fill out from Mr. Brand occurred on or before November 28, 2000, the claimant gave timely notice.

Moreover, as noted by the ALJ, it appears respondent had actual notice before claimant contacted Mr. Greg Gillen. Mr. Brand repeatedly asked claimant to fill out an accident report which indicates that he had reason to believe claimant's back problem was related to work.

Respondent next argues that claimant should be limited to his functional impairment because he failed to return to work for respondent when he was finally released without restrictions by Dr. D. Troy Trimble.

While claimant received medical treatment he had provided his supervisor, Mr. Brand, with work restrictions and was told that a full release without restrictions would be required before he could return to work with respondent. After his back surgery, the claimant again requested work within his restrictions but respondent never replied to that request. Claimant understood he had a restriction against lifting more than 40 pounds. The respondent did not reply to claimant's request for accommodated work, consequently the claimant obtained employment within his restrictions with an different employer on April 27, 2001. On September 17, 2001, Dr. Trimble released claimant to return to work without restrictions. Claimant did not return to work for respondent because he had already obtained employment. Nor did respondent offer claimant work.

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[2] *McIntyre v. A. L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996), K.S.A. 44-551(b)(1).

The Kansas appellate courts, beginning with *Foulk*[3], have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his pre-injury wage at a job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[4] Before claimant can claim entitlement to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.[5]

On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[6] where the accommodated job violates the worker's medical restrictions,[7] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[8] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

In this case, after surgery the claimant requested accommodated work with respondent and never received a reply. Claimant then obtained employment within his restrictions. It cannot be said claimant demonstrated bad faith by obtaining employment within the restrictions he had at that time. Moreover, the claimant did not know that the treating surgeon would ultimately release him without restrictions. And the claimant did have permanent restrictions imposed by Dr. Daniel D. Zimmerman. Upon a review of the entire evidentiary record the Board affirms the ALJ's determination that claimant is entitled to a work disability and finds no reason to disturb the ALJ's finding that the claimant has suffered a 24.9 percent work disability.

Lastly, the determination that claimant suffered a work-related injury eliminates the respondent's dispute regarding claimant's entitlement to temporary total disability compensation. The Board affirms the ALJ's determination claimant is entitled to temporary total disability compensation from March 20, 2001, through April 27, 2001.

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[8] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated July 21, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director